

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

0912139 B.C. LTD., a Canadian
corporation, and PAKAGE APPAREL
INC., a Canadian corporation,

Plaintiffs,

v.

RAMPION USA INC., a Washington
corporation, and RAMPION
ENTERPRISES LTD., a Canadian
corporation,

Defendants.

No. 2:18-cv-01464-JLR

PRE-HEARING STATEMENT AND
JOINT CLAIM CHART

Pursuant to the Court's Minute Order Setting Trial Dates and Related Dates (Dkt. 22), the Standing Order for Patent Cases, and Local Patent Rule ("LPR") 132, Plaintiffs ("BN3TH") and Defendants ("Rampion") submit the following Prehearing Statement and Joint Claim Chart with respect to the asserted claims of U.S. Patent Nos. 9,687,030 (the "'030 Patent") and 10,034,496 (the "'496 Patent") (collectively, the "Asserted Patents") for the July 12, 2019 Markman hearing.

A. BN3TH's Identification of Asserted Patent Claims and Accused Products:

Pursuant to the Standing Patent Order, BN3TH asserts the following patent claims:

- U.S. Patent No. 9,687,030: Claims 1, 2, 5-10, 12, 14, and 15
- U.S. Patent No. 10,034,496: Claims 1-10, 13-15.

The products accused of infringement under each claim are as follows, based on the information currently available to BN3TH, and with the understanding that discovery as to

Rampion's accused products is ongoing:¹

- Products Accused of Infringing U.S. Patent No. 9,687,030: Claims 1, 2, 5-10, 12, 14, and 15: All Rampion NIGHT SHIFT products, including the Rampion NIGHT SHIFT 6" boxer brief, as well as any other products with substantially equivalent structure and function, regardless of whether distributed under Rampion's own brand(s), through any private label partner or by other means.
- Products Accused of Infringing U.S. Patent No. 10,034,496: Claims 1-10, 13-15: All Rampion SWING SHIFT, POWER SHIFT, DAY SHIFT, GEAR SHIFT, and LONG JOHN products, including the SWING SHIFT 3" trunk, the SWING SHIFT 6" boxer brief, the SWING SHIFT 9" long leg boxer brief, the POWER SHIFT 3" trunk, the POWER SHIFT 6" boxer brief, the POWER SHIFT 9" long leg boxer brief, the DAY SHIFT 6" boxer brief, the GEAR SHIFT 9" long leg boxer brief, the LONG JOHN long underwear. In addition, BN3TH accuses of infringement any other products with substantially equivalent structure and function, whether distributed under Rampion's own brand(s), through any private label partner, or through other means, including all products with Rampion's "JOEY POUCH" feature or equivalent structure and function.²

B. Rampion's Identification of Invalidity Assertions:

Rampion contends that all of the asserted claims of the '030 Patent and '496 Patent are invalid. All of the asserted claims are invalid under 35 U.S.C. §§ 102 and/or 103 as anticipated and/or obvious. All of the asserted claims of the '496 Patent are invalid under 35 U.S.C. § 112

¹ BN3TH served interrogatories on Rampion early in this case seeking to identify all products with the same structure and function as the listed accused products, and all changes and iterations to the designs of those products. To date, Rampion's interrogatory responses list only model names (Day Shift, Gear Shift, Swing Shift, Power Shift and Night Shift). Rampion has agreed to provide more detailed information, but is still compiling that information, and has not indicated specifically what information will be provided.

² BN3TH objects to Rampion's invalidity assertions (Section B of this document) to the extent Rampion includes (1) invalidity contentions that are subject to BN3TH's pending motion to strike (ECF # 33) or (2) invalidity contentions that differ from and are broader than those disclosed in Rampion's original, first amended, or proposed second amended infringement contentions, and for which changes Rampion has not sought leave of Court or made a showing of good cause as required by LPR 124.

1 for lack of written description. Claim 2 of the '030 Patent and claim 2 of the '496 Patent are
 2 invalid under 35 U.S.C. § 112 as indefinite. All of the asserted claims of the '030 Patent and
 3 '496 Patent are also invalid for statutory and/or obviousness-type double patenting.

4 The following is a listing of prior art that anticipates or renders the claims obvious:

- 5 • Pub. No. US 2004/0025218 A1 (Huang) (the "'218 Publication")
- 6 • WO 01/37687 A1 (Carrillo, et al.) ("WO 01/37687")
- 7 • U.S. Patent No. 7,958,571 (Kitsch, et al.) (the "'571 Patent")
- 8 • Pub. No. US 2008/0178369 A1 (Kitsch, et al.)
- 9 • Pub. No. US 2007/0277285 A1 (Gravette, et al.) (the "'285 Publication")
- 10 • Pub. No. US 2009/0106874 A1 (Shlush) (the "'874 Publication")
- 11 • WO 98/39981 (Hartley) (the "'981 Publication")
- 12 • European Patent Application No. EP 0 476 818 A1 (Dagg, et al.)
- 13 • Canadian Industrial Design Registration No. 133058 (KE Imports) (the "'058
 14 Design")
- 15 • U.S. Patent No. 7,631,369 (Geiwald, et al.) (the "'369 Patent")
- 16 • Pub. No. US 2007/O220660 A1 (Geiwald, et al.)
- 17 • Andrew Christian – Show-It Technology Brief, Underwear News Briefs, at
 18 <https://www.underwearnewsbriefs.com/2009/03/andrew-christian-show-it-technology-brief/>, produced at Rampion_0000101-107
- 19 • Underwear of the Week – Andrew Christian "Show-It" Line, Underwear News
 20 Briefs, at <https://www.underwearnewsbriefs.com/2009/03/underwear-of-the-week-andrew-christian-show-it-line/>, produced at Rampion_0000108-114
- 21 • Andrew Christian products with "Show-It" technology (also referred to as
 22 Show-It Technology 2.0) ("Andrew Christian Show-It Underwear")
 23 (Rampion_0000101-107, Rampion_0000108-114, Rampion_0000115-121,
 24 Rampion_0000122-128, Rampion_0000129-135, Rampion_0000136-142,
 25 Rampion_0000143-149, Rampion_0000155-156, Rampion_0000157-159,
 26

Rampion_0000160-161, Rampion_0000162-163, Rampion_0000164-166,
 Rampion_0000198-200, Rampion_0000201-203, Rampion_0000204,
 Rampion_0000205, and ACI000001-ACI000152)

- Printed publications describing Andrew Christian Show-It Underwear
 (Rampion_0000101-107, Rampion_0000108-114, Rampion_0000115-121,
 Rampion_0000122-128, Rampion_0000129-135, Rampion_0000136-142,
 Rampion_0000143-149, Rampion_0000155-156, Rampion_0000157-
 159, Rampion_0000160-161, Rampion_0000162-163, Rampion_0000164-166,
 Rampion_0000198-200, Rampion_0000201-203, Rampion_0000204,
 Rampion_0000205, and ACI000001-ACI000152)
- Saxx underwear products (The '571 Patent is currently assigned to SAXX
 Holdings Inc. On information and belief, the Saxx Underwear products will
 have the same or similar disclosure as the '571 Patent.) (Rampion_0000098-100,
 Rampion_0000150-154, Rampion_0000197)
- Printed publications describing Saxx underwear products (Rampion_0000098-
 100, Rampion_0000150-154, Rampion_0000197)
- Body Tech line from UnderGear featuring an “enhancement pouch”
 (Rampion_0000155-156, Rampion_0000185-188, Rampion_0000189-192,
 Rampion_0000193-196, Rampion_0000206-209)
- Printed publications describing products from the Body Tech line from
 UnderGear featuring an “enhancement pouch” (Rampion_0000155-156,
 Rampion_0000185-188, Rampion_0000189-192, Rampion_0000193-196,
 Rampion_0000206-209)
- 2(x)ist products with “dual lifting technology” (Lift Collection)
- Printed publications describing 2(x)ist products with “dual lifting technology”
 (Lift Collection)

The invalidity assertions listed above are based on the information currently

available to Rampion, and with the understanding that discovery is ongoing.³

C. Agreed Claim Constructions:

Pursuant to LPR 132(a), the parties have agreed to the constructions of the following claim terms, phrases, or clauses:

Claim Term	Agreed Construction
“Pouch” Found in claims: 1, 9, and 15 (’030 Patent and ’496 Patent)	“a concave space”
“Elastically Resilient Four-Way Stretch Material” Found in claims: 1 and 10 (’030 Patent and ’496 Patent)	“fabric capable of stretching in each of two different directions (e.g., up/down <i>and</i> left/right or length <i>and</i> width) with substantial elastic recovery toward its pre-stretching size and shape”

D. Joint Claim Chart:

The Joint Claim Chart, together with exhibits consisting of the asserted patents, the relevant portions of the prosecution histories, and cited dictionaries, treatises, and other extrinsic evidence required by LPR 132(b)-(c) and the Standing Patent Order, is filed herewith. The ten most important disputed claim terms as agreed by the parties are identified with an asterisk (*) in the Joint Claim Chart (and are the first 10 claim terms listed in the chart).⁴

E. Anticipated Length of Time Necessary for the Claim Construction Hearing:

Pursuant to LPR 132(d), the parties agree that the 5-hour day provided for in the Standing Patent Order is an appropriate length for the claim construction hearing in this case.

F. Proposed Order of Presentation for the Claim Construction Hearing:

³ Rampion has pending third party subpoenas issued to Andrew Christian, Inc. (regarding the Andrew Christian Show-It Underwear), Hanover Direct, Inc. (regarding the Body Tech line from UnderGear featuring an “enhancement pouch”), and Jacques Moret, Inc. (regarding the 2(x)ist products with “dual lifting technology” (Lift Collection)). This Court has also granted Rampion’s motion for issuance of letters rogatory regarding Saxx underwear products, and Rampion is working with counsel for Saxx Underwear Co. to obtain the requested documents and things, if any.

⁴ Two additional terms are disputed and listed in the joint claim construction chart, beyond the ten terms indicated for claim construction briefing with asterisks. The parties anticipate continuing to meet and confer regarding these two terms prior to the claim construction hearing and, if necessary, following the claim construction hearing to determine if any continuing dispute remains after related terms are construed.

Pursuant to LPR 132(e), the parties propose a “ping-pong” order of presentation, with both parties addressing one term to conclusion before moving on to the next term, and taking turns presenting first on individual terms.

G. Parties’ Position on Live Testimony, Tutorials, and Any Pre-Hearing Conference for the Claim Construction Hearing:

Pursuant to LPR 132(f), the parties do not believe that live testimony should be presented at the claim construction hearing and neither party intends to present live witness testimony. Nor do the parties believe that a tutorial or a pre-hearing conference is needed before or in connection with the claim construction hearing in this matter. See LPR 132(g)-(h)

H. Parties’ Position on Appointment of an Independent Expert:

Pursuant to LPR 132(i), the parties do not believe that appointment of an independent expert is necessary in this case.

RESPECTFULLY SUBMITTED:

Dated: May 1, 2019

DORSEY & WHITNEY LLP

/s/ Erin Kolter

(via email authorization)

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PRE-HEARING STATEMENT AND
JOINT CLAIM CHART** on the following named person(s) on the date indicated below by

“ mailing with postage prepaid

“ hand delivery

“ facsimile transmission

“ overnight delivery

“X CM/ECF notification

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